

Ogden Food Service Corporation and Bakery, Confectionery & Tobacco Workers International Union, AFL-CIO, Baker's Local No. 118. Case 5-CA-14643

March 7, 1983

DECISION AND ORDER

**BY CHAIRMAN MILLER AND MEMBERS
JENKINS AND HUNTER**

Upon a charge filed on August 25, 1982, by Bakery, Confectionery & Tobacco Workers International Union, AFL-CIO, Baker's Local No. 118, herein called the Union, and duly served on Ogden Food Service Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint on September 13, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 26, 1982, following a Board election in Case 5-RC-11775, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about August 17, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 23, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 27, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 4, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent

thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its response to the Notice To Show Cause, Respondent essentially denies the validity of the Union's certification and asserts it is not required to recognize and/or bargain with the Union. Respondent contends that the Board should have dismissed the petition in Case 5-RC-11775 on the jurisdictional ground that Prince George's County exercises such control over employment conditions that Respondent could not engage in meaningful collective bargaining.

The General Counsel submits that Respondent is improperly seeking to litigate issues which were raised and determined in the representation case. We agree.

Review of the record herein reveals that the Union on April 26, 1982, filed a petition in Case 5-RC-11775 seeking an election in a unit of employees employed at Respondent's cafeteria and snack bar located in the Prince George's County Administration Building in Upper Marlboro, Maryland. On June 4, 1982, the Regional Director issued a Decision and Direction of Election, finding, *inter alia*, that "the Employer can effectively engage in collective bargaining, and it therefore does not share the County's exempt status." No request for review of the Regional Director's decision was ever filed with the Board.

Pursuant to the Decision and Direction of Election, a secret-ballot election was held on July 9, 1982, which resulted in a tally of 9 votes for, and 3 against, the Union. On July 26, 1982, the Union was certified by the Regional Director as the exclusive representative of the employees in the appropriate unit.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.²

All issues raised by Respondent in this proceeding were or could have been litigated in the prior

¹ Official notice is taken of the record in the representation proceeding, Case 5-RC-11775, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enf'd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enf'd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

² See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.³ Accordingly, we grant the Motion for Summary Judgment.⁴

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Delaware corporation with an office and place of business in Upper Marlboro, Maryland, where it is engaged in the business of providing cafeteria and vending machine services at the Prince George's County Administration Building. During the preceding 12 months, a representative period, Respondent, in the course and conduct of its business, derived gross revenues in excess of \$500,000. During the same period, Respondent purchased and received products valued in excess of \$50,000 directly from points outside the State of Maryland.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Bakery, Confectionery & Tobacco Workers International Union, AFL-CIO, Baker's Local No.

³ While Respondent does not offer to adduce any additional evidence on the jurisdictional issue, it does assert that "new evidence has arisen since the representation proceedings were held." According to Respondent, this "new evidence consists of the Union's having made unlawful bargaining demands." We find no merit in this contention. An examination of the documents referred to by Respondent reveals that the Union merely proposed that the unit employees be part of another bargaining unit and be covered under the contract governing that other unit. Inasmuch as modification of a Board-certified unit is a permissible subject of bargaining, we find nothing "unlawful" in the Union's proposal. See *Newport News Shipbuilding and Dry Dock Company*, 236 NLRB 1637 (1978), *enfd.* 602 F.2d 73 (4th Cir. 1979).

Member Hunter adheres to the "intimate connection" test for the reasons set forth in his dissenting opinion in *Wordsworth Academy*, 262 NLRB 438 (1982). Member Hunter has examined Respondent's contention concerning the jurisdictional issue in light of that test and has concluded that no basis has been presented for disturbing the Regional Director's jurisdictional findings. Accordingly, Member Hunter joins in granting the Motion for Summary Judgment.

While Chairman Miller agrees in principle with the *Wordsworth Academy* dissent, in the circumstances of this case he finds no reason to discuss the "intimate connection" test.

⁴ Moreover, we have reviewed the record in the representation case and find no basis for overturning the Regional Director's decision.

118, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and part-time employees employed by the Employer at its cafeteria and snack/bar located in the Prince George's County Administration Building in Upper Marlboro, Maryland, but excluding all managers, guards and supervisors as defined in the Act.

2. The certification

On July 9, 1982, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 5, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 26, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about August 13, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 17, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 17, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Ogden Food Service Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Bakery, Confectionery & Tobacco Workers International Union, AFL-CIO, Baker's Local No. 118, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and part-time employees employed by the Employer at its cafeteria and snack/bar located in the Prince George's County Administration Building in Upper Marlboro, Maryland, but excluding all managers, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 26, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the afore-

said appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 17, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Ogden Food Service Corporation, Upper Marlboro, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Bakery, Confectionery & Tobacco Workers International Union, AFL-CIO, Baker's Local No. 118, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and part-time employees employed by the Employer at its cafeteria and snack/bar located in the Prince George's County Administration Building in Upper Marlboro, Maryland, but excluding all managers, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and

other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Upper Marlboro, Maryland, facility copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and

other terms and conditions of employment with Bakery, Confectionery & Tobacco Workers International Union, AFL-CIO, Baker's Local No. 118, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and part-time employees employed by the Employer at its cafeteria and snack/bar located in the Prince George's County Administration Building in Upper Marlboro, Maryland, but excluding all managers, guards and supervisors as defined in the Act.

OGDEN FOOD SERVICE CORPORATION